

Before the
Federal Communications Commission
 Washington, D.C. 20554

FCC 04M-41

In the Matter of)	EB Docket No. 04-381
)	
Florida Cable Telecommunications)	
Association, Inc.; Comcast Cablevision of)	
Panama City, Inc.; Mediacom Southeast,)	
L.L.C.; and Cox Communications Gulf,)	
L.L.C.,)	
)	
Complainants,)	
)	
v.)	
)	
Gulf Power Company,)	
)	
Respondent.)	

ORDER**Issued:** December 14, 2004**Released:** December 15, 2004

This ruling is in furtherance of discussions at Prehearing Conference conducted on December 13, 2004.¹

The issue set in this case by the Commission requires Gulf Power to prove by a preponderance of the evidence:

In short, before [Gulf Power] can seek compensation above marginal cost, it must show *with regard to each pole* that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations.

HDO at Para. 3.² (Emphasis added.)

¹ See *Order* FCC 04M-38, released November 17, 2004.

² *Hearing Designation Order*, EB Docket No. 04-381 (DA 04-3048), released September 27, 2004 ("*HDO*").

The *HDO* assigns the burdens of proceeding and proof as follows:

Gulf Power - - - bears the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation above marginal cost *with respect to specific poles*.

HDO, Para. 8. (Emphasis added.)

I

It was made clear by the Presiding Judge that the primary fact issue that controls the scope of discovery and trial is accounting – on a pole by pole basis – for Complainants’ cable attachments on utility poles that are owned or controlled by Gulf Power. Therefore, to receive relief for compensation that exceeds the Cable Formula, Gulf Power must – as a condition precedent – identify “specific poles” that Gulf Power contends are fully utilized, and provide convincing reasons for considering an identified pole as fully utilized. *See APCO v. F.C.C.*, 311 F 3d 1357, 1370-71 (11th Cir. 2002) (power company must prove “with regard to each pole” that the pole is at full capacity).³

In the interest of administrative efficiency, there should be prepared by a qualified consultant or accountant, under Gulf Power direction, a complete accounting (1) by identification, (2) by description of current utilization, and (3) by current plans for future usage, with respect to each pole owned and/or controlled by Gulf Power that is occupied by all or any of the Complainant cable companies.

Georgia Power shall report in writing to the Presiding Judge **by January 11, 2004**, the decision and intentions of Gulf Power in engaging such a qualified third person to conduct such a study. The report should also include any instructions and task assignments furnished to prospective consultants/accountants/surveyors under consideration.⁴

³ The authorities are the “law of the case.”

⁴ The use of a qualified third-party consultant and/or accountant or surveyor with expertise in conducting studies, increases the study’s reliability and would expedite its preparation to meet the current discovery needs of this case. An independent study will also help to avoid timely and costly document requests of minute scraps of paper pursuant to more formalized discovery.

II

To further assist the parties in preparing for discovery and hearing preparation, the following documents are ordered to be produced and exchanged **by January 11, 2004**:

Gulf Power shall provide to Complainants and the Enforcement Bureau, copies of all planning documents presently in existence for current and prospective use of identified poles to which Complainants have cable attached.

The Complainants shall provide to Gulf Power and the Enforcement Bureau all inventory/accounting/schematic documents that describe and/or account for the utility poles of Gulf Power that are being utilized for attaching cable by all or any of the Complainants.

III

In complying with this directive, the parties are to use their best efforts to make full and expedited production of relevant business documentation that can be reasonably interpreted as being responsive to this *Order*, applying a broad meaning of "relevance."⁵

Counsel for the Complainants and counsel for the Respondent shall submit to the Presiding Judge **by January 14, 2005**, a Status Report (preferably joint) on exchanges of the aforesaid documents. Such Status Report must include description and explanation of the documents, comments on reliability, and suggestions on how the documents might be used to define and describe the universe of relevant poles, and/or lead to further discovery.⁶

⁵ This expedited discovery is limited to business documents of private parties that have not been prepared with litigation in mind, and shall not include documents (or portions of documents) that disclose attorney-client privileged communications. Documents produced shall be treated with confidentiality by all receiving counsel. For the present, documents produced shall be shown only to opposing counsel appearing in this proceeding and their assistants. Documents produced may be stamped "Confidential," but that description may later not apply to evidence introduced on-the-record at the hearing. Counsel may submit a more comprehensive confidentiality order at a convenient date for signature by the Presiding Judge.

⁶ If counsel deem it helpful to understanding these documents, illustrative exemplary excerpts, with explanation, may be submitted with the Status Report.

IV

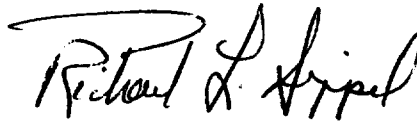
The parties also should jointly request a second Prehearing Conference to take place on a convenient date before **January 31, 2005**, to discuss these business documents and to consider how they may assist to stipulate to ultimate facts, or assist in any other purpose.

Counsel should also be prepared to discuss follow-up discovery of documents and related depositions.

Such request for conference shall also include a suggested agenda of points to discuss.

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION⁷

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with a large initial "R" and "S".

Richard L. Sippel
Chief Administrative Law Judge

⁷ Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.